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FILED
2012 JUL 13 P 2:01
RICHARD W. WICKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

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ELECTRONIC FRONTIER FOUNDATION

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DMR

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.
DEPARTMENT OF COMMERCE,

Defendant.

CV Case No. 12 3683

COMPLAINT FOR INJUNCTIVE
RELIEF FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff seeks the processing and release of records requested from Defendant, Department of Commerce, and its component, Bureau of Industry and Security, concerning the agency's processing of applications for the export to foreign nations "of devices, software, or technology primarily used to intercept or block communications."

PARTIES

2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco, California and Washington, D.C. EFF is a member-supported organization that works to inform policymakers and the general public about civil liberties issues related to technology and to act as a

defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and disseminate information concerning the activities of federal agencies.

3. Defendant Department of Commerce (DOC) is a Department of the Executive Branch of the United States Government. DOC is an “agency” within the meaning of 5 U.S.C. § 552(f). The Bureau of Industry and Security (BIS) is a bureau within Defendant DOC.

JURISDICTION

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

VENUE AND INTRADISTRICT ASSIGNMENT

5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action occurred in this district and division, where Plaintiff is headquartered.

FACTUAL ALLEGATIONS

The Use of Western Technology to Surveil and to Censor Dissidents and to Support Repressive Regimes

7. Recent political upheaval in the Middle East has demonstrated both the promise – and peril – that Western technology provides for citizens living under repressive regimes. *See, e.g.,* John Pollock, *Streetbook: How Egyptian and Tunisian Youth Hacked the Arab Spring*, Technology Review (September 2011);¹ *but see*, Ben Elgin & Vernon Silver, *The Surveillance Market and Its Victims*, Bloomberg News (Dec. 20, 2011).²

8. For example, social networking platforms, like Twitter and Facebook, provided a valuable tool for dissidents and protesters to disseminate information during the revolution in

¹ Available at <http://www.technologyreview.com/featured-story/425137/streetbook/>.

² Available at <http://www.bloomberg.com/data-visualization/wired-for-repression/>.

1 Tunisia, *see, e.g.*, Yasmine Ryan, *How Tunisia's Revolution Began*, Al Jazeera (Jan. 26, 2011),³
 2 yet, at the same time, technology developed by Western firms, such as McAfee, was being used by
 3 Tunisian officials to intercept and block communications on the Internet. *See e.g.*, Paul Sonne &
 4 Steve Stecklow, *U.S. Products Help Block Mideast Web*, Wall Street Journal (Mar. 27, 2011).⁴

5 9. Tunisia's experience is by no means unique: surveillance and filtering technology
 6 developed in the West has been linked to regimes throughout the Middle East and the world –
 7 including Egypt, Syria, Libya, Yemen, and China. *See, e.g.*, Jennifer Valentino-Devries *et al.*, *U.S.*
 8 *Firm Acknowledges Syria Uses Its Gear to Block Web*, Wall Street Journal (Oct. 29, 2011);⁵
 9 Loretta Chao & Don Clark, *Cisco Poised to Help China Keep an Eye on Its Citizens*, Wall Street
 10 Journal (July 5, 2011).⁶

11 10. The federal government, and Defendant in particular, is an active participant in the
 12 export of this technology. In order to export some types of equipment used to intercept, monitor, or
 13 block communications, American companies must apply for, and receive, licenses from Defendant.

14 11. According to Defendant's response to a separate FOIA request, since 2007, for at
 15 least one category of technology requiring an export license – the export of devices used for
 16 "surreptitious listening" – Defendant has received, and granted, applications for export to Syria,
 17 Jordan, Gabon, Lebanon, United Arab Emirates, Afghanistan, Iraq, and Mexico.

18 12. These applications – and the licenses ultimately granted for the export of this
 19 technology – are not currently available to the public.

20 **Plaintiff's FOIA Request**

21 13. By letter dated May 7, 2012 and sent by email to BIS, Plaintiff requested under the
 22 FOIA all agency records (including, but not limited to, electronic records) created from 2006 to the
 23 present, concerning "the export of devices, software, or technology primarily used to intercept or
 24

25 ³ Available at <http://www.aljazeera.com/indepth/features/2011/01/2011126121815985483.html/>.

26 ⁴ Available at
<http://online.wsj.com/article/SB10001424052748704438104576219190417124226.html>.

27 ⁵ Available at
<http://online.wsj.com/article/SB10001424052970203687504577001911398596328.html>.

28 ⁶ Available at
<http://online.wsj.com/article/SB10001424052702304778304576377141077267316.html>.

1 block communications.”

2
3 14. Although Plaintiff’s request sought *all* agency records (including export
4 applications and licenses) for any “devices, software, or technology primarily used to intercept or
5 block communications,” Plaintiff’s request highlighted one particular subset of these records: “All
6 export license applications classified under Export Control Classification Numbers 5A980, 5D980,
7 and 5E980, including any records reflecting those license applications that were granted or
8 denied,” as well as “[a]ll agency guidelines, policies, or analyses reflecting or concerning the types
9 of systems, equipment and components, software, or technology that are “primarily useful for the
10 surreptitious interception of wire, oral, or electronic communications.”

11 15. On information and belief, Defendant received Plaintiff’s request letter, described in
12 paragraphs 13 and 14 on May 7, 2012.

13 16. By letter dated June 5, 2012, Defendant responded to Plaintiff’s FOIA request,
14 releasing 2 pages of records in full and withholding all license applications in full under Exemption
15 3 of FOIA, 5 U.S.C. § 552(b)(3).

16 17. By letter dated June 11, 2012, and sent by email, Plaintiff submitted an
17 administrative appeal to Defendant, challenging both Defendant’s improper withholding of
18 responsive records and the adequacy of Defendant’s search for responsive records.

19 18. To date, Defendant has failed to respond to Plaintiff’s administrative appeal, in
20 violation of the 20 working-day statutory deadline.

21 19. Defendant has wrongfully withheld the requested records from Plaintiff.

22 **CAUSE OF ACTION**

23 **Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records**

24 20. Plaintiff repeats and realleges paragraphs 1-19.

25 21. Defendant has wrongfully withheld agency records requested by Plaintiff by failing
26 to comply with the statutory time limit for the processing of FOIA requests and appeals.

27 22. Plaintiff has exhausted the applicable administrative remedies with respect to
28 Defendant’s wrongful withholding of the requested records.

23. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

REQUESTED RELIEF

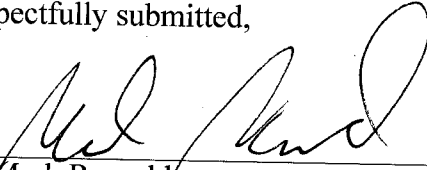
WHEREFORE, Plaintiff prays that this Court:

1. order Defendant and its component to process immediately the requested records in their entirety;
2. order Defendant and its components, upon completion of such processing, to disclose the requested records in their entirety and make copies available to Plaintiff;
3. order Defendant and its components to waive all fees associated with the processing and release of the requested records;
4. provide for expeditious proceedings in this action;
5. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
6. grant such other relief as the Court may deem just and proper.

DATED: July 13, 2012

Respectfully submitted,

By


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